Supreme Court, U.S.
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(7)

No. 92-1271

In the Supreme Court of the United States

OCTOBER TERM 1992

LUIS ANDRES ESQUIVEL-BERRIOS, PETITONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals deprives a litigant of due process if it takes official notice of facts relevant to a matter before it without first giving the litigant prior notice, even if it grants the litigant an opportunity to rebut the noticed facts by means of a motion to reopen.

2. Whether 28 U.S.C. 2347(c) required the court of appeals to remand the case to the Board of Immigration Appeals for taking new evidence even though the alien had not yet attempted to present the proffered evidence to the Board by means of a motion to reopen.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 971 F.2d 26. The opinions of the Board of Immigration Appeals (Pet. App. 22a-26a) and the immigration judge (App., *infra*, 1a-11a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1992. The court of appeals denied a petition for rehearing on November 4, 1992. The petition for a writ of certiorari was filed on January 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Nicaraguan citizen who fled to Honduras and then Guatemala in 1985 at the age of thirteen. He entered the United States without inspection in July of 1988. The Immigration and Naturalization Service (INS) apprehended him on July 21, 1988, near Brownsville, Texas, and initiated deportation proceedings. Pet. App. 5a; Pet. 3-4; App., *infra*, 4a.

2. At his deportation hearing, petitioner conceded that he was deportable and applied for asylum and withholding of deportation. App., *infra*, 4a. In support of his asylum claim, petitioner testified that the Sandinista government seized and forcibly conscripted boys as young as 12. He further testified that he did not wish to serve in the military because he considered the war unjust and did not agree with the Sandinista government. He also stated that he feared that he would be sent to fight without training and that he would be killed or be held as a prisoner of war. Finally, he testified that he feared that he would be shot or imprisoned for avoiding conscription if he returned to Nicaragua. *Id.* at 6a-8a.

At the hearing, petitioner sought a continuance for the purpose of introducing evidence of the State Department's *Country Reports on Human Rights Practices* for Nicaragua. The judge denied the continuance, noting that the date of the hearing had been set six weeks in advance, and that petitioner's counsel had failed to show an adequate justification for failing

to procure his documentary evidence before the hearing. AR 144-145.[1]

The immigration judge denied petitioner's application for asylum and withholding of deportation. App., *infra*, 1a-11a. The judge credited petitioner's testimony (*id.* at 9a), but concluded that it was insufficient to establish that he would be persecuted if he returned to Nicaragua (*id.* at 10a-11a). As the judge explained, the

> sole basis upon which [petitioner] fears returning to Nicaragua is that he fears that he would have to go into the military in that country or [that] if he did not go into the military he would be harmed by the Government of Nicaragua either through physical harm or imprisonment.

Id. at 9a. Relying on the "long accepted position of the Board [of Immigration Appeals] that it is not persecution for a country to require military service of its citizens," *ibid.*, the judge rejected petitioner's claim.[2]

3. Petitioner appealed to the Board of Immigration Appeals. After briefing, the Board dismissed the appeal. Pet. App. 22a-26a. First, the Board took administrative notice "that the Sandinista party no

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[1] "AR" refers to the certified administrative record of the deportation proceedings.

[2] The judge went on to state that "there is no objective evidence of record * * * that Nicaragua recruits into its military 12 or 13 year olds for military service." App., *infra*, 9a-10a. The judge noted that petitioner did not allege that he received any notice to serve in the military or that he ever was recruited. *Id.* at 10a.

longer controls the Nicaraguan government," explaining that effective April 25, 1990, a coalition of parties opposed to the Sandinistas had taken office following national elections in which Violeta Chamorro was elected president. *Id.* at 23a-24a. The Board also noted that President Chamorro had "announced a general amnesty covering hostilities between the former Contra resistance and the Nicaraguan government and an end to military conscription." *Id.* at 24a. Because petitioner's claim of persecution was based on his "fear of conscription by the Sandinistas," *id.* at 23a, the Board found that the record could not support a finding that petitioner had a well-founded fear of persecution, *id.* at 24a.

The Board also rejected petitioner's claim that the immigration judge's denial of his motion for a continuance was error. Pet. App. 25a-26a. First, it agreed with the immigration judge's conclusion that petitioner had failed to show "good cause" for the motion, explaining that petitioner's counsel had entered his appearance six weeks before the deportation hearing and therefore had adequate time to determine what materials he wished to offer into evidence. *Id.* at 25a. Second, the Board concluded that the absence of the *Country Reports* did not prejudice petitioner's asylum claim, because the reports demonstrated only that the Sandinistas conscripted individuals during the years they covered (1984-1985 and 1987-1988); they did not establish petitioner's eligibility for relief after the change of government in Nicaragua. *Id.* at 25a-26a.

4. Petitioner sought review of the Board's decision in the Seventh Circuit. That court consolidated his

petition with petitions filed by Agustin Rhoa-Zamora, Felipe Antonio Juresma-Altamirano, and Luis Rodriguez-Altamirano and affirmed. Pet. App. 1a-21a. As the court of appeals understood petitioner's briefs, petitioner made three arguments: (1) the Board deprived him of due process by failing to accord individualized consideration to his claims; (2) the record did not contain substantial evidence to support the Board's finding that petitioner did not have a well-founded fear of persecution; and (3) even if petitioner would not face future persecution, he was entitled to asylum based on the severity of his past persecution. *Id.* at 18a. The court did not view petitioner as making the argument, advanced by Rhoa-Zamora, that the Board deprived him of due process by failing to give him an opportunity to rebut facts of which the Board took administrative notice. *Id.* at 2a-3a, 18a-20a.[3]

With respect to the due process argument raised by petitioner, the court of appeals acknowledged that the Board had used "boilerplate paragraphs in describing the salient factors involved in its determination." Pet. App. 18a. The court of appeals nevertheless found that a review of the entire decision demonstrated "that the Board's decision contains sufficient indicia of individualized determination to satisfy due process." Pet. App. 18a.

The court also rejected petitioner's substantial evidence argument, reasoning that "[t]he Board's

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[3] The court of appeals considered that claim and rejected it. Pet. App. 14a-15a. Rhoa-Zamora has challenged that holding in a separate petition, *Rhoa-Zamora* v. *INS*, No. 92-1299, to which we are filing a separate response.

decision is supported by the evidence that was before it at the time it decided [the] case." Pet. App. 19a. The court refused petitioner's request that it evaluate the sufficiency of the evidence in light of new material that petitioner contended would rebut the facts of which the Board took official notice. *Ibid.* The court also declined to remand the case to the Board to require it to consider the new evidence, noting that petitioner was free to file a motion to reopen with the Board as a means to cause the Board to consider the new evidence. *Ibid.* The court concluded its opinion by explaining: "Because such a motion implements a due process right, it must be considered in good faith by the Board. We admonish the Board to consider petitioner['s] motio[n] in that light." *Id.* at 21a (citations omitted).[4]

ARGUMENT

1. Petitioner's principal argument (Pet. 9-22) is that the Board deprived him of due process by "bas[ing] a decision on official notice without warning and an opportunity to present contrary evidence." Pet. 9. Petitioner did not, however, adequately present that claim to the court of appeals, and the court did not consider that claim in denying his petition.[5] As discussed above, petitioner's due process

[4] On petitioner's third argument, the court concluded that petitioner's allegations of past persecution were not sufficiently extreme to justify granting relief in the absence of a finding that he would suffer persecution in the future. Pet. App. 19a-20a. Petitioner has not pressed that argument in this Court.

[5] Petitioner did state in his brief in the court of appeals that "due process requires that [petitioner] be given the opportunity to rebut the BIA's officially-noticed factual findings." Pet.

argument in the court of appeals was that the Board failed to accord individualized consideration to his appeal, not that it deprived him of due process by failing to warn him that it would rely on officially noticed facts. See Pet. App. 18a.[6] Although the court of appeals noted that Rhoa-Zamora raised that argument (*id.* at 3a), the court of appeals did not consider whether petitioner was deprived of due process on that basis.[7] See Pet. App. 18a-20a (discussion of petitioner's claims).

C.A. Br. 41; see *id.* at 43 (arguing that petitioner "is constitutionally entitled to refute the accuracy of these facts"). But those brief statements appeared in the midst of a section pertaining to a statutory claim for relief under 28 U.S.C. 2347 (which authorizes the courts of appeals to remand to require an agency to supplement a record). Moreover, those statements did not clearly suggest the due process claim raised here, that the Board deprived petitioner of due process even if it did give him an opportunity to refute the officially noticed facts (by means of a motion to reopen); in this Court petitioner argues that the Due Process Clause requires *advance* notice, not "the opportunity to rebut" the findings. Pet. C.A. Br. 41. In our view, the court of appeals acted reasonably in concluding that the general scattered references to the Due Process Clause were not adequate to raise this distinct constitutional claim. We have lodged a copy of petitioner's court of appeals brief with the Clerk.

[6] Petitioner did raise a related claim in the court of appeals that the nature of the noticed facts rendered them inappropriate for administrative notice, but he does not advance that claim in the petition. See Pet. 9 n.7.

[7] The absence of any discussion of that argument with respect to petitioner is particularly evident from the portion of the petition arguing that the circuits have reached conflicting results on the question. When petitioner argues that the "court of appeals based much of its reasoning on earlier decisions of

This Court does not ordinarily review a question that was not presented to or passed on by the lower courts. See, *e.g.*, *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) (the Court does "not ordinarily consider questions not specifically passed upon by the lower court"); *Demarest* v. *Manspeaker*, 498 U.S. 184, 188-189 (1991) (Court declines to consider question not presented to the lower courts). That practice ensures both that the lower courts are given a fair opportunity to consider dispositive arguments and that this Court gains the benefit of the lower courts' analysis of the questions it considers. Given the fact-intensive nature of due process analysis in this area, it would be particularly inappropriate for the Court to depart from that practice in this case. Because the question presented by petitioner was not properly preserved, it does not merit review in this case.[8]

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the [D.C. Circuit and the Fifth Circuit]," Pet. 10, it can only be referring to Pet. App. 14a-15a, a portion of the opinion of the court of appeals expressly addressed to Rhoa-Zamora's claims, not petitioner's.

[8] We summarize our views on the merits of that question in our response to *Rhoa-Zamora* v. *INS*, No. 92-1299, the other petition challenging the judgment of the court of appeals. As we explain there, the Board's treatment of Rhoa-Zamora—who took advantage of the administrative avenue for challenging officially noticed facts—shows that the process developed by the BIA does not deny due process. In that case, the Board evaluated the evidence submitted by Rhoa-Zamora and concluded on the merits that, considered in light of the evidence at the initial proceeding, the evidence did not justify a change in its initial decision. That process adequately addresses the due process concerns raised by petitioner. We are providing petitioner with a copy of our brief in that case.

2. Petitioner also argues (Pet. 22-25) that the court of appeals erred in declining to remand the case to the Board for consideration of additional evidence under 28 U.S.C. 2347(c). We disagree. Section 2347(c) provides only that a court "may," upon satisfaction of the statutory conditions of materiality and cause, "order the additional evidence * * * to be taken by the agency." Nothing in the statute *requires* a court to use the statutory mechanism to secure agency consideration of newly proffered evidence. Hence, the decision of the court of appeals to allow the Board to consider the evidence through its customary reopening procedures—rather than pursuant to a remand under 28 U.S.C. 2347(c)—is not in any way inconsistent with the language of the statute.

Petitioner also errs in arguing (Pet. 23) that the court of appeals has created a conflict in the circuits by "conclu[ding] that Section 2347(c) now is unavailable on review of Board decisions." As the court of appeals explained in its disposition of Rhoa-Zamora's petition, the Seventh Circuit in fact does apply Section 2347(c) to decisions of the Board, and requires a remand whenever "the administrative record is inadequate because the Board has failed without justification to consider newly discovered evidence." Pet. App. 16a (quoting *Osaghae* v. *INS*, 942 F.2d 1160, 1162 (7th Cir. 1991)). In this case, however, petitioner failed to meet that standard, because he "has never given the Board *any* opportunity to consider this evidence." Pet. App. 19a.[9]

[9] Unlike Rhoa-Zamora, petitioner has not filed a motion to reopen to present his new evidence to the Board. See Pet. App. 4a-5a (discussing Rhoa-Zamora's motion to reopen).

Contrary to petitioner's suggestion (Pet. 24-25), the decision of the court of appeals does not conflict with the decision of the Tenth Circuit in *Becerra-Jimenez* v. *INS*, 829 F.2d 996 (1987). In that case, the Tenth Circuit rejected the government's categorical argument that Section 2347(c) was rendered completely inapplicable to Board proceedings by the possibility that the Board would consider new evidence pursuant to motions to reopen. *Id.* at 1001-1002.[10] The Tenth Circuit had no occasion in that case to consider whether a remand would be required in every case in which new evidence was proffered, or whether it would be permissible, as the Seventh Circuit concluded in this case, to rely on the agency's obligation to consider evidence presented by means of motions to reopen in appropriate circumstances.[11] The

[10] The court in *Becerra-Jimenez* suggested that the Ninth Circuit had adopted the government's categorical position barring use of Section 2347(c) in the review of Board decisions. As the Seventh Circuit explained in *Osaghae*, it is not at all clear that the Ninth Circuit's view is as broad as the *Becerra-Jimenez* panel suggested. See *Osaghae*, 942 F.2d at 1162. If subsequent decisions of the Ninth Circuit make it clear that it does follow such a broad rule, the issue might merit review at that time in an appropriate case.

[11] Petitioner's suggestion of a conflict between the Seventh Circuit's decision in this case and the Tenth Circuit's decision in *Becerra-Jimenez* is considerably undermined by the assumption of the *Osaghae* panel (on whose decision the court of appeals relied in this case) that it was following *Becerra-Jimenez*, not rejecting it. See *Osaghae*, 942 F.2d at 1162. The precise scope of the Tenth Circuit's views on the question remains unclear, because the Tenth Circuit has not issued a published opinion involving Section 2347(c) since its 1987 decision in *Becerra-Jimenez*.

courts of appeals that have considered that question generally have concluded, like the Seventh Circuit, that petitioner's absolute rule requiring a remand would be inappropriate, because "in normal circumstances a party asserting new and material evidence should, in the first instance, resort to the [motion to reopen procedures] available under 8 C.F.R. § 3.2, rather than invoking our power under § 2347(c)." *Martinez de Mendoza* v. *INS*, 567 F.2d 1222, 1226 n.9 (3d Cir. 1977); see *Paul* v. *INS*, 521 F.2d 194, 201 (5th Cir. 1975) (declining to remand on the ground that the petitioners could have moved to reopen the proceedings before the Board)[12]; see also *Osaghae*, 942 F.2d at 1162 ("[T]he applicant must first petition the agency to reopen the case.").

In sum, petitioner has not established that any other court of appeals would have applied a categorical rule requiring a remand to the Board under Section 2347(c) even though petitioner had not even attempted to cause the Board to consider the proffered evidence under the Board's own procedures. Accordingly, there is no conflict in the circuits and no occasion for this Court's review.

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[12] Although a subsequent Fifth Circuit panel in *Coriolan* v. *INS*, 559 F.2d 993 (1977), questioned the *Paul* panel's reliance on motions to reopen, *id.* at 1003, the Fifth Circuit has continued after *Coriolan* to rely on the availability of relief pursuant to a motion to reopen. See *Fleurinor* v. *INS*, 585 F.2d 129, 133 (1978) (declining to grant relief under Section 2347(c); citing *Paul* and noting that petitioner "has declined to pursue th[e] avenue" of a motion to reopen). Accordingly, in our view the Fifth Circuit's decisions do not establish a categorical rule requiring a remand in all cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1993

APPENDIX

IN THE MATTER OF:

LUIS ANDRES ESQUIBEL-BERRIOS RESPONDENT — CASE NO. A28 578 493

IN DEPORTATION PROCEEDINGS — DATE: September 29, 1988

To: Rowena Jones, Esq.
PROYECTO LIBERTAD
110A E. Jackson
Harlingen, TX 78550

Chief Legal Officer
U.S. Immigration and
Naturalization Service
2102 Teege Avenue
Harlingen, TX 78550

INDICIA OF ORAL DECISION

The following is issued pursuant to this Court's Oral Decision on the Record of September 29, 1988 in the above entitled matter.

Based upon the Court's finding that Respondent is deportable on the charge in the Order to Show Cause; and further based upon the Court's decision that Respondent's applications for asylum under Section 208, withholding of deportation under Section 243(h), and voluntary departure under Section 244, of the Immigration and Nationality Act be denied,

IT WAS ORDERED that Respondent in this matter be deported from the United States to Nicaragua pursuant to the charge as contained within the Order to Show Cause.

DETAINED

alleges that respondent is not a citizen or national of the United States but that he is a native and citizen of Nicaragua who entered the United States near Brownsville, Texas on or about July 21, 1988 without being inspected at the border by a United States Immigration Officer. The Order to Show Cause, therefore, charges that respondent is subject to deportation from the United States pursuant to Section 241(a)(2) of the Immigration and Nationality Act (The Act) in that respondent entered the United States without inspection.

On August 17, 1988, respondent through counsel of record admitted allegations 1 through 4 in the Order to Show Cause and conceded deportability as charged therein. That was done on a record of Master Calendar Appearance Form (Exhibit 2). Based upon the admissions and concessions made by respondent through counsel of record to the allegations and charge in the Order to Show Cause the Court finds that deportability as charged in the Order to Show Cause has been established by evidence that is clear, convincing and unequivocal. Respondent declined to select a country for deportation if that were to become necessary and the Court designated respondent's native country of Nicaragua for that purpose.

The respondent sought relief from deportation in the form of asylum, withholding of deportation and in the alternative voluntary departure. Respondent timely filed his application for asylum (Exhibit 3) on Form I-589. An application for asylum made as in this case after the institution of deportation proceedings shall also be considered as an application for withholding of deportation under Section 243(h) of the Act.

Pursuant to the regulations, a copy of the Form I-589 was forwarded to the State Department Bureau of Human Rights and Humanitarian Affairs in order to

seek an advisory opinion. The Court received from the Department of State a response dated September 2, 1988, wherein the State Department stated that the Department of State Bureau of Human Rights and Humanitarian Affairs has no factual material about this specific applicant. It referred the parties to the State Department's Country Reports on Human Rights Practices. That State Department response, as required by the regulations, was placed in the record (Exhibit 4). However, the Court is not giving that document any evidentiary weight in this proceeding. Further the Court does not consider it as a positive or negative evaluation, recommendation or advisory opinion with respect to respondent's applications for asylum or Section 243(h) withholding of deportation. In addition, the Court has not referred to the State Department's Country Reports on Human Rights Practices as that has not been offered into evidence by either party.

Statement of the facts

The relevant facts in this case and the sole evident[i]ary bases for this Court's decision come from respondent's asylum application, respondent's testimony at the deportation hearing as well as the questions asked upon cross examination by the Service as part of that testimony.

Respondent is 17 years of age. He is from the Department of Chinandega in the country of Nicaragua. Respondent has a father, mother and two brothers who live in Nicaragua at this time. Respondent also has another brother who is currently living in Guatemala. Respondent attended school for six years, five of those in Nicaragua and one and a half years in Guatemala. Respondent did not work while in Nicaragua because he was studying at the time. Respondent is Catholic and he attended church

services in Nicaragua when he lived there on Sundays with his family. Respondent's parents are also Catholic.

Respondent testified that life for him was very hard in Nicaragua. He testified that he did not agree and he does not agree with the politics of the Government of Nicaragua such as obligatory military service and also the manner in which the Government is run. He testified that the Government of Nicaragua and its policies have affected him because a person is drafted into obligatory military service where he is placed to fight for a cause that he does not consider just. Respondent testified that there is a war going on at this time in Nicaragua and that he knows this by reading newspapers. However, he does not know whether the war was taking place in or near Chinandega because he left Nicaragua in February of 1985. It was respondent's testimony that even when he left Nicaragua there was obligatory military service and persons were made to spend 40 years in the army. He testified that he has been in recent contact with his family through his brother in Guatemala and has been told that they say that life is hard in Nicaragua in that there is not enough food for the people there. Respondent testified that he does not know how the military in Nicaragua treats the civilian population in Nicaragua and that he did not know that either when he was in the country.

He testified that he does not want to fight in the army in Nicaragua because he does not like to kill people or fight in the way that the Nicaraguan Army fights. He testified he does not want to fight with the military of his country because he does not agree with the Government. It was his testimony that he decided to leave Nicaragua in 1985, because the situation was becoming worse and worse each day and

he believed that if he stayed he would be sent to fight without training and he would be killed or become a prisoner of war. He testified that he thought at that time that he would be drafted because he was 12 years old and he understood that persons 12 and 13 years old were drafted into the military. He testified that he knows boys 12 or 13 years old who were drafted.

Respondent left Nicaragua in 1985, spent 15 days in Honduras and then went to Guatemala where he remained for three and a half years. He stayed there receiving help from an adult friend of his, and also with the help of respondent's brother. Respondent initially had permission to study. However, due to a job that he had, he could not go to school any longer. Respondent did not have work permission. Since he was no longer studying he lost his permission to be in Guatemala and spent the last one and a half years in Guatemala without legal documents to be there. He testified that he was afraid that being illegally in Guatemala he may be deported to Nicaragua and that is why he left to come to the United States.

Respondent testified that he believes that if he were sent to Nicaragua at this time he would be shot or put in jail for ten or twenty years because they would believe that he was unpatriotic.

Respondent testified that his brother in Guatemala does not have any legal status to be there and also does not have work permission. Respondent was working in Guatemala. However, he also had no work permission there.

It was respondent's testimony that the main reason he does not want to return to Nicaragua is that he does not want to serve in the military. He testified he does not know the age requirements for the draft in Nicaragua. Respondent testified he does not know anybody who was shot or imprisoned upon returning

to Nicaragua but he believes that that would happen because the Government will know that he did not want to stay in that country. Respondent did not receive a notice to report to the military in Nicaragua prior to his departure. Further he testified that his brother Jose who is in Nicaragua is 21 years old and he was drafted into the military in Nicaragua about two years ago.

Conclusions of law

The applicant bears the evidentiary burdens of proof and persuasion in any application for withholding of deportation under Section 243(h) or asylum under Section 208 of the Act. To be eligible for withholding of deportation pursuant to Section 243(h) an alien's facts must show a clear probability of persecution in the country designated for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. This means that the alien's facts must establish that it is more likely than not that he will be subject to persecution for one of the grounds specified.

To be eligible for asylum under Section 208 of the Act an alien must meet the definition of a "refugee", which requires him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group or political opinion. The burden of proof required to establish eligibility for asylum is lower than that required for withholding of deportation. See *INS* v. *Cardoza-Fonseca*, 107 Supreme Court 1207 (BIA 1987). An applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution for one of the five grounds specified in the Act. See *Matter of Mogharrabi* interim dec. 3028 (BIA 1987); see also *Guevara-Flores*

v. INS, 786 2d [*sic*] 1242 (5th Cir. 1986). Further asylum unlike withholding of deportation may be denied in the exercise of discretion to an alien who establishes statutory eligibility for the relief. see [*sic*] *Matter of Pula* interim dec. 3033 (BIA 1987).

The Court finds that respondent was a credible witness in the deportation proceeding. His testimony was direct and forthright with respect to events that happened to him. The court also finds that respondent was testifying truthfully as to his beliefs and as to what he feared might happen to him. Respondent's testimony was consistent throughout.

The Court finds that respondent has not met his burden to show that he is eligible for asylum under Section 208 of the Act or for withholding of deportation under Section 243(h) of the Act. Respondent's sole basis upon which he fears returning to Nicaragua is that he fears that he would have to go into the military in that country or if he did not go into the military he would be harmed by the Government of Nicaragua either through physical harm or imprisonment. In *Matter of A-G-*, Interim dec. 3040 (BIA 1987) the Board of Immigration Appeals held that it has been the long accepted position of the Board that it is not persecution for a country to require military service of its citizens. The Board held that there are exceptions to this rule that may be recognized in those cases where a disproportionately severe punishment would result on account of one of the five grounds enumerated in Section 101(1)(42)(A) of the Act or where the alien would necessarily be required to engage in inhuman conduct as a result of military service required by the Government.

Upon a careful review of the record, the Court finds that there is no objective evidence of record either

through respondent's testimony or otherwise that Nicaragua recruits into its military 12 or 13 year olds for military service. Respondent did not receive any notice to serve in the Nicaraguan Military when he was there nor was he ever recruited while there. The record does not reflect any specific evidence to show that boys 12 or 13 years old were drafted into the Nicaraguan Army, or that respondent would be punished in Nicaragua if returned for failure to serve in the Nicaraguan Army prior to his leaving that country in 1985. Although respondent did state that he knows of boys who were drafted at age 12 or 13 he did not provide any specific information as to who and under what circumstances. Respondent certainly may be required to serve in the Nicaraguan military if returned there at present and he may be convicted of a crime and jailed if he refuses to serve. However, under *Matter of A-G-, Supra*, that is not considered persecution within the meaning of the Act. In addition the respondent has not shown by objective record evidence either through his testimony or otherwise that he would receive disproportionate punishment for failure to serve in the military or that in military service in Nicaragua he would be required to violate international legal standards. Any speculations by respondent or conclusional testimony by him in the record in this regard is not sufficient to prove that he is eligible for asylum or Section 243(h) withholding of deportation. Respondent presented no objective evidence either in his testimony or otherwise to show that he would be shot or that he would be kept in jail for a very lengthy period of time.

Based upon all of the above, this Court concludes that respondent has not met his burden to show that there is a clear probability that he would be persecuted in Nicaragua within the meaning of the Act,

nor has he shown that a reasonable person in his circumstances would fear persecution as that term is defined in the Act. Simply because respondent does not agree with the policies of his government, that is no reason to find that the requirement that he serve, or any conviction for failure to serve, in the military would be persecution.

Respondent presented no record evidence as to his eligibility under either Section 244(e) of the Act or the applicable regulations for voluntary departure in lieu of deportation. Therefore, that alternative request for relief will also be denied.

ORDER

IT IS HEREBY ORDERED that respondent's applications for asylum under Section 208, withholding of deportation under Section 243(h), and voluntary departure under Section 244(e), of the Act be denied.

IT IS FURTHER ORDERED that respondent be deported from the United States to Nicaragua pursuant to the charge of deportability as set forth in the Order to Show Cause.

/s/

HOWARD ACHTSAM
Immigration Judge

8/28/89